NG THIAN SOONG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
MOHD. JEMURI SERJAN SCJ
[SUPREME COURT CRIMINAL APPEAL NO. 33 OF 1987]
14 MARCH 1990

CRIMINAL PROCEDURE: *Murder - Summing up of a Judge to the jury where circumstantial evidence is concerned.*

The appellant was charged with the murder of one Chan Yee Mai (f) and was found guilty by the jury by a majority verdict of 5 to 2. He was sentenced to death.

The appellant appealed, *inter alia*, that the Judge began his summing up to the jury on the last day of the trial past the normal office hours. The jury retired to consider their verdict at 5.57 p.m. When the Court re-convened at 8.08 p.m., the foreman informed the Judge that the jury had come to a 4 to 3 decision whereupon the Judge invoked s. 228 of the Criminal Procedure Code ("CPC") and required the jury to retire again for further consideration. After the jury had retired for the second time, they returned a verdict of guilty by a majority of 5 to 2 to which the Judge concurred.

It was argued by Counsel for the appellant, that as the jury had already decided by a majority of 4 to 3 in the first instance, they became *functus officio* and as such, the verdict by which the accused was found guilty was a nullity. It was also alleged that the learned judge had pressurised the jury to come to a verdict by telling them that they would have to stay in Court the whole night until a verdict was reached.

The appellant also questioned the adequacy or sufficiency of the directions given to the jury on the subject of circumstantial evidence to connect the accused with the crime of murder.

Held:

[1] The *functus officio* argument is wholly without substance. The foreman merely informed the Court that they had come to a 4 to 3 decision without stating what the verdict was. Thereupon the Judge required the jury to retire for further consideration under s. 228 of the Criminal Procedure Code.

[2] After the summing up, it would be most undesirable to allow the jury to go home and to re-convene the next day for their verdict. In the circumstances, if the Judge had told the jury that they might have to stay the whole night until a verdict was reached, it could not be construed as pressurising the jury, for the Judge was merely stating a fact.

[3] The adequacy or sufficiency of the directions given to the jury on the subject of circumstantial evidence to connect the accused with murder requires serious consideration because the case of the prosecution against the accused was wholly based on circumstantial evidence. In a case of the present nature, where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial Judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each

strand of circumstantial evidence, and then leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding of the guilt of the accused could be arrived at. It is necessary for the trial Judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. As the principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, the failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice.

[4] Further, merely to direct the jury to consider whether the murder weapon belonged to the accused without anything more to connect him with the commission of the crime, would render the summing up on this particular circumstantial evidence a misdirection. There is no presumption in law that the owner of a murder weapon is the murderer.

[5] The fact that the Judge merely stated that the accused was staying in close proximity with the place where the deceased was found without mentioning the accessibility of the place to others would certainly give the impression that only the accused and no one else had access to the building and this would clearly be a misdirection.

[6] There was no motive for the killing, so the jury ought to have been asked expressly whether anyone else who had access to the complex could have committed the crime. The Judge merely pointed out that the murder weapon and the newspapers - from which a portion was torn to wrap it - was found in the store area (where the accused lived) of the building, and that the door to the store area was not locked, without stating what inference could be drawn from such fact.

[7] The Judge also merely pointed out that the cardboard sleeve to the chopper was found on a table in the accused's room on the second visit by Inspector Soh to the scene of the crime, but the jury was not told what inference could be drawn from the fact that if the incriminating sleeve had been there all the time, why was it not seized at the time of the accused's arrest? Why was it found only on a second visit, especially when the accused's room was never locked between the arrest and the discovery?

[8] The summing up of the trial Judge on circumstantial evidence was manifestly inadequate so as to constitute a misdirection which had occasioned a miscarriage of justice in the circumstances of this particular case.

[9] The other unsatisfactory aspect of this case was the ruling by the Judge to exclude the evidence of bare denial by the accused on the ground that it constituted a defence of alibi and therefore not admissible in the absence of notice served on the prosecution under s. 402A of the Criminal Procedure Code. A bare denial is not equivalent to evidence in support of an alibi and as such no notice is required under s. 402A. To deny the accused from putting his defence to the jury, however implausible it may appear would most certainly occasion a miscarriage of justice particularly having regard to the weak nature of the prosecution case.

[10] The Court would therefore allow the appeal, quash the conviction and set aside the sentence of death. The appellant is acquitted and discharged.

[Conviction quashed appellant acquitted and discharged.]

Cases referred to:
Siew Kam Weng v. Public Prosecutor [1990] 1 CLJ (Rep) 260
Lee Koh Eng v. Public Prosecutor [1975] 1 MLJ 132
Abdullah bin Saad v. Public Prosecutor [1956] 22 MLJ 92
Jayaraman & Ors. v. Public Prosecutor [1982] CLJ (Rep) 130
McGreevy v. Director of Public Prosecutions [1973] 1 All ER 503
Ku Lip See v. Public Prosecutor [1982] 1 MLJ 194
Public Prosecutor v. Lim Chen Len [1981] 2 MLJ 41
Vasan Singh v. Public Prosecutor [1989] 1 CLJ (Rep) 166

Legislation referred to:
Criminal Procedure Code, ss. 193, 204(ii), 228, 234, 402A
Evidence Act 1950, s. 114
Penal Code, s. 302,

For the appellant - Bachan Singh (Kartor Singh with him); M/s. Bachan & Kartor
For the respondent - Stanly Isaacs, DPP Peguam Negara Malaysia

JUDGMENT

Mohd. Azmi SCJ:

The appellant was tried by jury in the Kuala Lumpur High Court and found guilty of murder by a majority verdict of 5 to 2, and he was convicted and sentenced to death on 10 April 1987. The charge preferred against him was in the following terms:

> That you on 3 October 1983, between 5.00 p.m. and 6.00 p.m beside an unnumbered house near the Lin Lum Crematorium, No. 2, Lorong Kerayong, Kuala Lumpur, in the Federal Territory of Kuala Lumpur, did commit murder by causing death of one Chan Yee Mai (f) and that you have thereby committed an offence punishable under s. 302 of the Penal Code.

There are numerous grounds of appeal, but we need only deal with three major arguments which in our view merit consideration.

The first principal complaint relates to the circumstances leading to the majority verdict of guilty being returned by the jury which according to learned Counsel for the appellant would render the guilty verdict null and void. It is on record that when the learned Judge began his summing up to the jury on the last day of the trial, it was already past the normal office hours. The jury retired to consider their verdict at 5.57 p.m. and when the Court re-convened at 8.08 p.m. the foreman informed the Judge that the jury had come to a 4 to 3 decision, whereupon the learned Judge invoked s. 228 Criminal Procedure Code and required the jury to retire again for further consideration. It was only after the jury had retired for the second time that they returned a verdict of guilty of murder by a majority of 5 to 2 to which the learned Judge concurred. It was strenuously argued that since the jury had already decided by a majority of 4 to 3 in the first instance, they became *functus officio* and as such the verdict by which the accused was found guilty was a nullity. There is also allegation in the petition of appeal that the learned Judge had pressurised the jury to come to a verdict by telling them that they would have to stay in Court the whole night until a verdict was reached.

In our view the *functus officio* argument is wholly without substance. In *Siew Kam Weng v. Public Prosecutor* [1990] 1 CLJ (Rep) 260 at 263, this Court had the occasion to express an opinion on s. 204 of the CPC. We wish to reiterate that because of the express requirement under s. 204(ii) that a majority verdict of the jury must not be less than 5 to 2, anything less cannot constitute a verdict in law. Accordingly, when the jury in the case before us had indicated that they had reached a decision by a majority of 4 to 3, the learned Judge was

perfectly entitled to resolve the deadlock by requiring them to retire for further consideration under s. 228 Criminal Procedure Code before exercising his discretion to discharge them under s. 234, should they continue to disagree on a verdict. Secondly, the authority of *Lee Koh Eng v. Public Prosecutor* [1975] 1 MLJ 132 FC relied upon by the learned Counsel for the appellant for the argument that the jury was *functus officio* after they had returned a majority verdict of 4 to 3, was a case decided in Penang under the Straits Settlement Criminal Procedure Code, in particular with reference to s. 193 which was not in *pari materia* with s. 204(ii) of the Federated Malay States Criminal Procedure Code. Section 193 (SS Cap. 21) merely provided that the jury should consist of seven persons. Whereas s. 204(ii) (FMS Cap. 6) goes further by providing that "The verdict returned shall be unaminous or by a majority of not less than five to two." Thus, in *Lee Koh Eng,* the jury had in fact returned a verdict of guilty of murder by a majority of 4 to 3 in the first instance, before they subsequently returned a similar verdict by a majority of 5 to 2. Whereas, in the instant case, because of the manner of the questions put to the foremen, the jury did not announce whether their earlier 4 to 3 majority decision was one of guilty or otherwise. What the learned Counsel for the appellant has failed to appreciate is that the procedure adopted by the learned Judge was in fact the practice recommended by Gill CJ in *Lee Koh Eng* and adopted ever since in the High Court to avoid the recurrence of the very *functus officio* argument which learned Counsel is now canvassing. The foreman of the jury in this case had merely informed the Court that they had come to a 4 to 3 decision without stating what the verdict was, and the learned Judge thereupon required the jury to retire for further consideration under s. 228 Criminal Procedure Code. We accordingly reject the *functus officio* argument.

Before leaving this subject, we would like to commend the learned Judge for sitting late in the evening instead of adjourning the trial to the next day after he had concluded his summing up to the jury. After the summing up, it would be most undesirable to allow the jury to go home and to re-convene the next day for their verdict. In the circumstances, if the learned Judge had told the jury that they might have to stay the whole night until a verdict was reached, it could not be construed as pressurising the jury, for the Judge was merely stating a fact. In the event, there is no merit in Ground 3 of the petition of appeal on the complaint that the learned Judge had directed the jury to reconsider their verdict at 8.08 p.m. and indicated that they would have to stay the whole night until a verdict was reached.

We now proceed to consider the more substantial grounds of appeal on the adequacy or sufficiency of the directions given to the jury on the subject of circumstantial evidence to connect the accused with the crime of murder. This particular issue requires serious consideration because the case of the prosecution against the accused was wholly based on circumstantial evidence. There was no evidence that the accused was with the deceased around the time she was brutally attacked. In his summing up, the learned Judge had tabulated various strands of evidence, the combined effect of which, would according to the directions be sufficient to prove that it was the accused who had inflicted the fatal injuries on the deceased on 3 October 1983 between 5.00 p.m. and 6.00 p.m. The jury was directed to consider the following seven circumstantial evidence:

(1) There was close proximity between the place where the deceased was found and the building in which the accused had a room.

(2) The chopper (Exhibit P6) that was used to inflict the fatal injuries on the deceased was found in the building in which the accused had a room.

(3) The accused was the owner of the chopper (Exhibit P6), having bought it from Ying

Chee Wah (PW10), and assistant shopkeeper in September 1983, i.e., about one month prior to the murder. In addition, the deposition of Wong Moi Sun, the daughter of Wong Kuan Ying (PW8), one of the caretakers of the crematorium was read in Court to the effect that about two weeks prior to the crime, she saw the accused using the chopper when he was cooking.

(4) The chopper when recovered was wrapped with a piece of a paper torn from newspaper (Exhibit P19) found in the building.

(5) Cardboard sleeves (Exhibit P10) for the chopper was found in accused room on a table, subsequent to his arrest.

(6) The accused lived alone in the building, and,

(7) The accused and the deceased knew each other prior to the incident.

In a case of the present nature, where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial Judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at the guilt of the accused. Thus, in *Abdullah bin Saad v. Public Prosecutor* [1956] 22 MLJ 92, the fact that the accused pawned some jewellery belonging to the deceased, a day after the killing could not by itself be sufficient evidence to form a conviction of a murder under illustration (a) of s. 114 Evidence Act. Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial Judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inferences, and failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice.

It must be noted at this point that since *Jayaraman & Ors. v. Public Prosecutor* [1982] CLJ (Rep) 130, the then Federal Court had applied *McGreevy v. Director of Public Prosecutions* [1973] 1 All ER 503, by holding that a trial Judge's direction to jury on burden of proof is the same whether the prosecution evidence is direct or circumstantial, i.e., prove beyond reasonable doubt. Where the evidence is circumstantial, there is no further duty on the Judge as in the part, to direct jury that the evidence must be such as to be inconsistent with any other reasonable conclusion or hypothesis than the guilt of the accused in addition to prove beyond reasonable doubt. But be that as it may, these authorities do not relieve the trial Judge from the duty to make a balanced direction to the jury on other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they are equally favourable to the accused.

In this particular case, the only real evidence connecting the accused with the crime was the chopper (Exhibit P6), made in Japan "Fish Brand" common kitchen knife, which could probably be purchased from any shop. Although there was sufficient evidence to show that P6 was the murder weapon, there was no evidence that it was in fact the one purchased by the accused from PW10 about a month prior to the incident. Indeed PW10 was unable to answer in cross-examination that P6 could merely be similar to the knife sold to the accused. Nor is there evidence that the accused had handled P6, let alone used it against the deceased, on

that particular day. Since P6 might be similar only to the chopper bought by the accused, the deposition of Wong Moi Sun that she saw the accused using a similar knife to P6 whilst cooking about two weeks prior to the incident, could not improve the prosecution case any further than the fact that the accused had purchased a knife for a perfectly legitimate purpose. The accused denied that P6 was his but even assuming for one moment that the murder weapon belonged to the accused, in our view the learned Judge failed to instruct the jury sufficiently that police investigation had found nothing on the chopper to incriminate the accused. The jury was only directed that both the blood stains and the two strands of hair found on the chopper matched those of the deceased. But the jury was not asked to consider what inference could be drawn from the fact that there was no evidence at all to show that the accused had handled the murder weapon. Police Investigation revealed that his finger prints were not found on the chopper. The jury was also not asked to consider what inference could be drawn from the fact that although the accused was arrested within 12 hours of the incident, no blood stain or other incriminating matter was found on his clothing or his body, notwithstanding the fatal slash wounds and fractures inflicted on the deceased. In our judgment, merely to direct the jury to consider whether the murder weapon belonged to the accused without anything more to connect him with the commission of the crime would render the summing up on this particular circumstantial evidence a misdirection. There is no presumption in law that the owner of a murder weapon is the murderer.

The other material factor which the jury was not sufficiently directed is the fact that the scene of the crime was a religious complex, with a crematorium, a temple for vegetarians and a common cooking place. According to Wong Kuan Ying (PW8), one of the caretakers, the accused was a general worker there and he lived alone in a hut used as a store room near the crematorium. It seems clear from the evidence that the whole complex including the store room occupied by the accused were accessible to others including the caretakers. In our view, the failure to put this matter clearly to the jury for their consideration is a major flaw in the summing up of the learned Judge when dealing with the various circumstantial evidence. Merely stating that the accused was staying in close proximity with the place where the deceased was found without mentioning the accessibility of the place to others would certainly give the impression that only the accused and no one else had access to the building and this would clearly be a misdirection. There was no motive for the killing and the jury ought in the circumstances to have been asked expressly to consider whether anyone else who had access to the complex could have committed the crime. The learned Judge merely pointed out that the murder weapon P6 and the newspapers were found in the store area of the building and that the door to the store area was not locked, without stating what inference could be drawn from such fact. Again, the learned Judge merely pointed out that the cardboard sleeve to the chopper was found on a table in accused room on the second visit by Inspector Soh to the scene of crime, but the jury was not told what inference could be drawn from the fact that if the incriminating sleeve had been there on the table all the time, why was it not seized at the time of accused's arrest? Why was it found only subsequently on a second visit especially when accused room was never locked between the arrest and the discovery?

If the jury had been properly directed to consider the issue of accessibility of the whole complex including the room of the accused, and also of the absence of incriminating evidence on the murder weapon to connect the accused with the crime, it cannot be said with reasonable certainty what the verdict of the jury might have been particularly in a case where they appeared to have considerable difficulty in arriving at a verdict. The issue of accessibility would also affect the discovery by the police of the newspaper from the complex part of which had been torn off to wrap up the murder weapon and also to the other strands of

circumstantial evidence.

In our judgment, the summing up of the learned trial Judge on circumstantial evidence was manifestly inadequate so as to constitute a misdirection which had occasioned a miscarriage of justice in the circumstances of this particular case.

The other unsatisfactory aspect of this case was the ruling by the learned Judge to exclude the evidence of bare denial by the accused on the ground that it constituted a defence of alibi and therefore not admissible in the absence of notice served on the prosecution under s. 402A Criminal Procedure Code. The evidence expunged by the learned Judge is now reproduced:

> I worked until 11.00 a.m. At this time I found my zinc building too warm and I decided to come down to Pudu Raya. I then went to the City Lights later for the 3.00 p.m. show.
>
> After that I went for my dinner in the town. I reached home at about 8.30 p.m.

It is at this juncture that objection was taken by the DPP and after considering authorities in *Ku Lip See v. Public Prosecutor* [1982] 1 MLJ 194 and *Public Prosecutor v. Lim Chen Len* [1981] 2 MLJ 41, the trial Judge agreed that the evidence was inadmissible, being evidence in support of an alibi under s. 402A. To be fair to all concerned, no one at the trial could have been aware of the decision of this Court in *Vasan Singh v. Public Prosecutor* [1989] 1 CLJ (Rep) 166 where a distinction was made between evidence of bare denial and evidence in support of alibi in the testimony of an accused person. Where his evidence is a bare denial, it is not evidence in support of an alibi and as such no notice is required under s. 402A Criminal Procedure Code. It is rather unfortunate that the accused was interrupted too early in his testimony for the purpose of determining the true nature of his defence. But as the evidence now stood, we agree with the learned Counsel for the appellant that the evidence excluded merely amounts to a bare denial and such evidence ought not to have been expunged. To deny the accused from putting his defence to the jury, however implausible it may appear, would most certainly occasion a miscarriage of justice particularly having regard to the week nature of the prosecution case.

We would therefore allow the appeal, quash the conviction and set aside the sentence of death. The appellant is acquitted and discharged.

Also found at [1990] 1 CLJ 1107